

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: August 21, 2009

ADVISORY OPINION 09-901

DISQUALIFICATION: JUDGE AND ATTORNEYS ARE CO-DEFENDANTS IN FEDERAL LAWSUIT

ISSUE

Is a judge automatically disqualified merely because a party is represented by an attorney or a law firm that is currently the judge's co-defendant in a federal civil RICO action filed by disgruntled current/former litigants? **ANSWER:** No.

FACTS

The inquiring circuit judge, a retired circuit judge, and several attorneys and the attorneys' law firms are co-defendants in a civil RICO action filed in federal district court by disgruntled litigants from the circuit's domestic court. The active judge serves and the retired judge served solely in that court. The plaintiffs allege that the co-defendants committed acts of misconduct and conspired in illegal activities, all arising from their participation in cases in the domestic court. Only one plaintiff has been a party in a case before the inquiring judge, as recently as the week of the release of this opinion.

Before filing the pending RICO action, the plaintiffs had filed another civil RICO action against all current co-defendants, with the exception of the inquiring judge. The federal district court dismissed that action pursuant to a motion to dismiss.

The inquiring judge can in fact remain impartial and unbiased in any case in which a RICO co-defendant represents a party before him.

DISCUSSION

It is for the judge in the first instance to determine whether proper grounds for disqualification exist under Canon 3C. The judge should carefully consider the facts and circumstances known to him and determine whether, under Canon 3C(1),

his impartiality might reasonably be questioned. In applying the reasonable-person/appearance-of-impropriety analysis, the question is not whether the judge is impartial in fact, but whether a person of ordinary prudence in the judge's position, knowing all the facts known to the judge, finds that there is a reasonable basis for questioning the judge's impartiality. *In re Sheffield*, 465 So.2d 350, 356 (Ala. 1984).

Expressly included as a disqualifying ground in Canon 3C(1) is a judge's "personal bias or prejudice concerning a party." Canon 3C(1)(a). "Bias for or against an attorney, who is not a party, is not enough to require disqualification unless it can also be shown that such a controversy would demonstrate a bias for or against the party itself." *Henderson v. Dept. of Pub. Safety and Corrections*, 901 F.2d 1288, 1296 (5th Cir. 1990). The theory in imputing bias against an attorney to the party has been rejected: "Read broadly, this peremptory challenge type approach would bid fair to decimate the bench. Lawyers, once in controversy with a judge, would have a license under which the judge would serve at their will." *Davis v. Board of Sch. Comm'rs of Mobile County*, 517 F.2d 1044, 1050 (5th Cir. 1975).

Moreover, the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon the presumption and idea of impartiality. *Ex parte Melof*, 553 So.2d 554, 557 (Ala. 1989), *abrogated on other ground*, *Ex parte Crawford*, 686 So.2d 196 (Ala. 1996). Any disqualifying prejudice or bias as to a party must be of a personal nature and stem from an extrajudicial source. *Id.* Disqualifying favor does not necessarily comprehend every bias or partiality the judge may entertain with reference to the case, but must be of a character, calculated to seriously impair his impartiality and sway his judgment, and be strong enough to overthrow the presumption of his integrity. *See id.*

The context within which the disqualification question is presented here is a lawsuit filed against the inquiring judge and lawyers who regularly practice before him. These circumstances render suspect the ultimate purpose for filing the lawsuit. The speculation and conjecture of pleadings of a lawsuit should not alone lead to disqualifying relationships with the attorney co-defendants. *Cf.* Leslie W. Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct*, 36 (2d ed. 1992) (in regard to disallowing a party to disqualify a judge by filing a lawsuit against the judge, “impugning the integrity of a judge should not lead to disqualification when based on nothing more than the speculation or conjecture of pleadings”).

Moreover, the instant situation is akin to that of the filing of a collateral lawsuit against a judge by a litigant in a case before that judge.¹ Alabama courts and the Judicial Inquiry Commission have long thwarted the efforts of litigants to create, by their own actions, an artificial appearance of bias and prejudice, thereby attempting to control the issue of recusal of a particular judge. Advisory Opinion 07-876. “It is axiomatic that a litigant cannot control pending litigation by the mere filing of [an] action against the trial judge. To base disqualification on the mere filing of such an action would create chaos in the judicial system and could prevent cases from ever being tried.” *McLeod v. State*, 581 So.2d 1144, 1153 (Ala. Crim. App. 1990) (quoting Advisory Opinion 86-273) (the criminal defendant’s filing of actions under 42 U.S.C. § 1983 in federal district court, against the judge presiding in the defendant’s criminal trial, did not automatically require the judge to recuse under Canon 3C(1)).

¹This exact situation may have occurred here if the one federal plaintiff who was a party in a case before the inquiring judge filed the federal action before the inquiring judge issued the final disposition in the case.

In addition, a policy to the contrary would invite misconduct toward judges and halt the orderly administration of justice.

Here, were the former or current disgruntled litigants in the circuit’s domestic court allowed to so fundamentally affect the assignment of cases in that court and the ultimate exercise of authority and jurisdiction of that court, the possible costs to the domestic-court system would be catastrophic. In other words, to find that a judge is automatically disqualified in any case in which a party is represented by a lawyer or law firm named with the judge in a lawsuit would allow dissatisfied litigants to, in effect, dismantle the domestic-court system. Such wholesale disqualification would be accomplished merely by joining any “adversary” as a party to the lawsuit.

“Thus, each case of this nature must be considered on its own merits and in those instances where . . . it is easily determined from the face of the pleadings [of the collateral lawsuit] that the . . . action is completely frivolous, the mere filing of the action does not disqualify the trial court judge.” *McLeod*, 581 So.2d at 1153. Other facts and circumstances, such as the necessity of complicated, protracted litigation or the co-defendants’ sharing personal liability, could raise a reasonable question of the judge’s impartiality. *See* Advisory Opinion 88-326. However, absent circumstances evidencing an actual bias or reasonable question as to the judge’s impartiality, the judge has a duty to preside in those cases assigned to him. *See* Advisory Opinion 92-449.

In any proceeding in which one of the judge’s co-defendants in the federal action represents a party before the judge, the judge should disclose that fact to the attorneys and the parties, even if he believes that there is no real basis for disqualification. Canon 3E. This disclosure could avoid the appearance of impropriety and give the parties and their attorneys the opportunity to supply information regarding whether any additional circumstances exist under which the

judge's impartiality might reasonably be questioned. See Advisory Opinion 07-884.

The decision on a party's motion to recuse is specifically to be left to the judge for determination as a matter of fact and law. See Advisory Opinion 07-876. This opinion addresses only the ethical matter discussed above. In addition, this opinion does not consider the possibility of disqualification if one of the co-defendant lawyers or law firms represents the judge in the collateral lawsuit against them.

Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043.

REFERENCES

Advisory Opinions 07-884; 07-876; 92-449; 88-326; 86-273.

Alabama Canons of Judicial Ethics, Canons 3C; 3C(1); 3C(1)(a); 3E.

Henderson v. Dept. of Pub. Safety and Corrections, 901 F.2d 1288 (5th Cir. 1990).

Davis v. Board of Sch. Comm'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975).

McLeod v. State, 581 So.2d 1144 (Ala. Crim. App. 1990).

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In re Sheffield, 465 So.2d 350, 356 (Ala. 1984).

Leslie W. Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct*, 36 (2d ed. 1992).

This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 18 of the Rules of Procedure of the Judicial